FILED
AUG 21 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 5

FRED L. SHUTTLESWORTH,

*Petitioner,*

—v.—

CITY OF BIRMINGHAM.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

JACK GREENBERG
NORMAN AMAKER
10 Columbus Circle
New York, New York 10019

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

*Attorneys for Petitioner*

# INDEX


PAGE

Citations to Opinions Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Constitutional and Statutory Provisions Involved .... 3

Statement ..... 4

How the Federal Questions Were Raised and Decided Below ..... 10

Reasons for Granting the Writ ..... 11

I. Petitioner's Conviction Was Affirmed on a Record Containing No Evidence of His Guilt Contrary to the Due Process Clause of the Fourteenth Amendment ..... 11

II. Petitioner's Conviction Was Secured Under Ordinances Which as Applied to His Conduct Are Unconstitutionally Vague ..... 16

CONCLUSION ..... 19

APPENDIX ..... 1a

Order and Judgment of the Alabama Court of Appeals ..... 6a

Order of Alabama Court of Appeals Denying Rehearing ..... 7a

Orders of the Supreme Court of Alabama .....8a, 9a

## Table of Cases

PAGE

Bouie v. City of Columbia, —— U. S. ——, 12 L. ed. 2d 894 (1964) ..... 17

Cole v. Arkansas, 333 U. S. 196 (1948) ..... 13
Commonwealth v. Carpenter, 325 Mass. 519, 91 N. E. 2d 666 (1950) ..... 17
Connally v. General Construction Co., 269 U. S. 385 (1926) ..... 17

DeJonge v. Oregon, 299 U. S. 353 (1947) ..... 13
Drummond v. State, 37 Ala. App. 308, 67 So. 2d 280 ..12, 3a

Ex Parte Shuttlesworth, 369 U. S. 35 (1962) ..... 16

Fields v. City of Fairfield, 375 U. S. 248 (1963) ..... 13

Garner v. Louisiana, 368 U. S. 157 (1961) ..... 13

Lanzetta v. New Jersey, 306 U. S. 459 (1939) ..... 17

Phifer v. City of Birmingham, 160 So. 2d 898, cert. den. 160 So. 2d 902 .....5, 18
Phifer v. City of Birmingham, 6 Div. 930, Ct. of Appeals Manuscript ..... 3a

Shuttlesworth v. City of Birmingham, cert. den. 368 U. S. 959 (1962) ..... 16
Shuttlesworth v. City of Birmingham, 373 U. S. 262 (1963) ..... 16
Shuttlesworth v. City of Birmingham, 376 U. S. 339 (1964) .....13, 16

Taylor v. Louisiana, 370 U. S. 154 ..... 13
Thompson v. Louisville, 362 U. S. 199 .....12, 13, 17

Wright v. Georgia, 373 U. S. 284 (1963) .....12, 17

## Statutes

PAGE

28 U. S. C. §1257(3) ..... 2

General City Code of Birmingham, §1142 (as amended by §1436-F) ..... 3, 4, 10, 1a

General City Code of Birmingham, §1231 ..... 3, 4, 10

## Other Authorities

American Law Institute, *Model Penal Code, Tentative Draft*, No. 13, p. 14 ..... 17

Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L. J. 1 (1960) ..... 17

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

FRED L. SHUTTLESWORTH,

*Petitioner,*

—v.—

CITY OF BIRMINGHAM, ALABAMA.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Appeals entered in the above-entitled case on November 19, 1963, rehearing of which was denied on January 7, 1964. A petition for writ of certiorari was denied by the Supreme Court of Alabama on February 20, 1964 and rehearing was denied on March 26, 1964.

### Citation to Opinions Below

The opinion of the Alabama Court of Appeals (R. 143) is reported at 161 So. 2d 796 and is set forth in the appendix hereto, *infra*, p. 1a. The Supreme Court of Alabama rendered no opinion but its order denying certiorari is reported at 161 So. 2d 799.

## Jurisdiction

The judgment of the Alabama Court of Appeals (R. 142) was entered on November 19, 1963, appendix, *infra*, p. 6a. Application for rehearing was overruled January 7, 1964 (R. 147), appendix, *infra*, p. 7a.

A petition for certiorari filed in the Supreme Court of Alabama was denied on February 20, 1964 (R. 154), appendix, *infra*, p. 8a and an application for rehearing was denied on March 26, 1963 (154), appendix, *infra*, p. 9a. On June 17, 1964, Mr. Justice Black extended petitioner's time for filing a petition for writ of certiorari in this Court to August 23, 1964.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

## Questions Presented

1. Whether petitioner was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States by his conviction on a record containing no evidence of his guilt.

2. Whether petitioner was also denied due process of law by his conviction under ordinances which as applied to his conduct are unconstitutionally vague, under the Fourteeenth Amendment.

## Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 1142 of the General City Code of Birmingham as amended by Ordinance No. 1436-F:

> Streets and Sidewalks to Be Kept Open for Free Passage.—Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the City with any animal or vehicle, or with boxes or barrels, glass, rubbish or display of wares, merchandise or sidewalk signs or other like things, so as to obstruct the free passage of persons on such streets or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.
>
> It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the City after having been requested by any police officer to move on.

and Section 1231 of the General City Code of Birmingham:

> Obedience to Police.—It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer.

## Statement

Petitioner, Fred L. Shuttlesworth, a "notorious person in the field of civil rights in the City of Birmingham" (R. 48) was arrested on the morning of April 4, 1962 outside Newberry's Department Store at 19th Street and 2nd Avenue North in Birmingham, Alabama. He was tried and convicted in the City Recorder's Court of violating Sections 1142 (as amended by Section 1436-F) and 1231 of the General City Code of Birmingham and sentenced to a fine of $100.00 and costs and 180 days at hard labor (R. 1).

On appeal to the Circuit Court of Jefferson County, he was charged in a complaint containing two counts. Count one charged that F. L. Shuttlesworth:

> "... did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue, North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F" (R. 2).

Count two complained that petitioner:

> "... did refuse to comply with a lawful order, signal or direction of a police officer, contrary to and in violation of Section 1231 of the General City Code of the City of Birmingham" (R. 2).

In the Circuit Court, he was tried without a jury on October 29-30, 1962 (R. 15, 93), convicted and sentenced to $100 and costs, 52 days for failure to pay the fine and costs and 180 days at hard labor (R. 11).

The Alabama Court of Appeals on November 19, 1963, affirmed petitioner's conviction (R. 142), *infra*, p. 6a.

James Phifer, arrested simultaneously with Shuttlesworth, was tried with him on identical charges in the Circuit Court (R. 15-16) but his conviction was reversed by the Alabama Court of Appeals because of insufficiency of evidence, *Phifer* v. *City of Birmingham*, 160 So. 2d 898, cert. den. 160 So. 2d 902.

At the trial in Circuit Court the evidence offered by the City and that offered on behalf of petitioner and his co-defendant were in substantial contradiction. The City's chief witness, Police Officer Robert Byars who arrested petitioner, testified that about 10:30 a.m. on the morning of the arrest, he was standing on 19th Street just north of the alley between 2nd and 3rd Avenue North adjacent to Newberry's Department Store (R. 17). He saw petitioner and Phifer walking south on the west side of 19th Street toward 2nd Avenue "in company with three or four other people" (R. 17). Officer Byars then entered the alley entrance to Newberry's store located on the west side of 19th Street just north of the store (R. 17), walked through the store to the front entrance at the northwest corner of 2nd Avenue and 19th Street North (R. 18). From inside the entrance doorway, he looked out on the street (R. 18, 27) and saw petitioner "standing with a group of some ten or twelve people all congregated in one area" (R. 18). He observed the group "for a minute to a minute and a half while they stood" (R. 19). The group was "standing and listening and talking" (R. 18). "On some occasions," according to his testimony, "people who were walking in an easterly direction on the north side of 2nd Avenue had to go into the street to get around the people who were standing there" (R. 18).

He testified that he then "walked out of the store and informed the group of people they would have to move on and clear the sidewalk so as to allow free passage and not to obstruct it" (R. 19). "[S]ome of the group began to move gradually away" (19). "Not all of them began to move" and he "waited for a short time and again informed them they would have to move . . . " (19). At this point, petitioner Shuttlesworth is reported to have said "you mean to say we can't stand here on the sidewalk" or words to that effect (19). Officer Byars "said nothing in return," "hesitated again for a short time and informed them for the third and last time . . . they would have to move" (19). Petitioner then supposedly said "do you mean to tell me we can't stand here in front of this store?" at which time the officer informed him that he was under arrest (19). According to Byars' testimony, Shuttlesworth then said, "Well, I will go into the store" and started into the entrance of Newberry's Store (19). The officer stated: "he got inside the door and I reached and got him and told him again he was under arrest" (19).

Petitioner was then placed into custody "and taken to the west curb to await transportation to the City Jail" (R. 20).

Pedestrian traffic "was normal for a Wednesday at that particular time of day" (R. 21). When Byars first saw the group, they were walking south and not violating any ordinance or obstructing any traffic (R. 27). After he came out of the store and spoke to the group, he testified that "everybody else was in motion except the Defendant, Shuttlesworth, who had never moved" (R. 30). "No other person made any statement to [him] other than the defendant, Shuttlesworth . . ." (R. 20-21).

Other police officers corroborated Byars' testimony. Officer Renshaw testified that he first saw Byars when he was

talking to the group (R. 49); that he got off his motorcycle and walked over to the crowd (R. 49-50); that he heard Byars say, "For the third and last time, I am telling you you got to . . . move on, or words to that effect" (R. 51); that there were "eight or ten or twelve" persons in the crowd, "all colored" (R. 51) and that he recognized Shuttlesworth and assisted in his arrest (R. 50).

Officer Hallman testified that Byars called him and Officer Davis over from the southeast corner of 2nd Avenue and 19th Street North and that he went over and just as he stepped on the curb he heard Byars say, "I am telling you for the third time you will have to move on, you are blocking the crosswalk" (R. 62). He testified that there were 5 or 6 persons in the group and they all dispersed upon direction except Shuttlesworth (*Id.*).

Officer Byars testified that Shuttlesworth offered "no resistance" (R. 31) to the arrest. Another officer testified that force was not necessary in making the arrest (R. 50); that petitioner was "a docile prisoner" (R. 58) and that he did not give the arresting officers "any difficulty at all" (R. 58).

The evidence for the defense presented a very different version of what occurred. The petitioner testified that his co-defendant Phifer and a man named James Armstrong had been in federal court that morning and after leaving there walked down 19th Street "walking as pedestrians walk approaching the light at the intersection of 19th Street and 2nd Avenue North . . ." (R. 115). As they approached the intersection, "[a]lmost instantaneously or simultaneously with me as I got practically to the corner the officer came out of this door to my right and stepped in front of me" (*Id.*). The officer then said "move on" whereupon petitioner inquired "move where officer" (*Id.*). Byars said "anywhere but here, but move on" at which point peti-

tioner said "all right, I will go into the store" (*Id.*). At this point, petitioner turned and walked into the corner entrance to Newberry's store and had gotten approximately "four or five steps inside the store" when the officer said "you are under arrest" (*Id.*).

Petitioner Shuttlesworth further testified that it was the police officer who stopped him; he "would have had maybe another step or two to the curb" (R. 125). He stated that he never got to the corner and that "[h]ad I walked on I would have walked into him" (R. 116). The first time that he was informed that he was under arrest was when the officer stopped him in the store; the officer had not mentioned arrest before then (R. 121). Petitioner then continued:

> Q. When were you told why you were arrested? A. When was I told why?
>
> Q. Yes, on what charge you had been arrested on? A. I believe the only time that I heard of it—some officer came to the car as Phifer and I were sitting inside discussing what they were going to put against us or something like that.
>
> Q. They were discussing the charge to put against you? A. Yes (R. 119-120).

Petitioner's co-defendant, Rev. Phifer, testified that he and Rev. Shuttlesworth didn't stand on the corner at all (R. 131); that contrary to Officer Byars' testimony, Byars did not speak three times to petitioner or to the crowd (*Id.*); that in fact "[w]e were approaching the corner. We hadn't stopped" (R. 132); that Byars stepped around in front of Shuttlesworth "before we got to the curb" (*Id.*) and that he addressed his words only to Shuttlesworth (*Id.*).

Armstrong testified that he was with Shuttlesworth and Phifer on the morning of April 4th and that Byars came

out of Newberry's store when "[w]e were still moving coming to the corner" (R. 86), "placed himself in front of . . . Reverend Shuttlesworth" so he couldn't move (R. 86) and pointed to Shuttlesworth and told him to "move on" (R. 85). On cross-examination, he stated there were only four or five people in the group coming from the courthouse and "some of them were behind and when they got to the intersection they did not meet any friends there nor any one that knew Rev. Phifer or Rev. Shuttlesworth" (R. 90). When asked: "How long were you standing at that intersection," he answered: "I was walking to the intersection. I didn't get a chance to stand" (R. 91).

Another defense witness, Rev. Norris, testified that he was walking about 5 feet behind Shuttlesworth (R. 94); that when he first saw Officer Byars he was "passing the door just before you get to the corner" on the inside of Newberry's store as he, Norris, was passing on the outside (R. 94); that Byars came out from the entrance to Newberry's store walked around in front of Shuttlesworth and said "move on" whereupon Shuttlesworth said "move where officer" and Byars replied "anywhere but here" (R. 94). Norris testified that the only crowd that collected consisted of white and Negro persons standing there watching the officer and Shuttlesworth (R. 99), that there was "quite a number out there on that corner observing this arrest" (R. 100).

Another witness, Simpson Hall, testified that: "Before the Reverend Phifer and Shuttlesworth could get to the light he come and kind of stepped in front of Reverend Shuttlesworth and told him to move on" (R. 110). He and another witness, Walter King, testified that they only heard the officer ask Shuttlesworth to move one time (R. 110-106).

The entire arrest incident from the time the officer walked up to the intersection until the time he told Shuttlesworth that he was under arrest took less than a minute (R. 133).

The Court of Appeals did not attempt to reconcile the conflicts in testimony, holding that "the grounds set out and argued in appellant's (petitioner's) motion for new trial . . . were properly overruled as sufficient evidence was introduced for the court to find the defendant guilty under the complaint" (R. 145).

## How the Federal Questions Were Raised and Decided Below

Petitioner filed a motion to quash the complaint (R. 3) alleging that "the allegations of the complaint, and each count thereof, are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend"; that "Sections 1231 and 1142 of the 1944 General City Code of Birmingham, under which said complaint is brought, as applied to this defendant, violates . . . the First and Fourteenth Amendments to the Constitution of the United States of America; "that the aforesaid Sections 1231 and 1142 as applied to the defendant is unconstitutional on its face, and that it is so vague as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment of the United States" (R. 3-4).

Petitioner also filed a demurrer alleging abridgment of his rights of free speech and assembly under the First and Fourteenth Amendments; a violation of the due process clause of the Fourteenth Amendment because of unconstitutional vagueness of the ordinances and a violation of the privileges and immunities and equal protection clauses of the Fourteenth Amendment (R. 5-6).

At the close of the City's case (R. 81) and again at the close of all the evidence (R. 137), petitioner filed a motion to exclude the evidence on the ground that there was no evidence to support the complaint and that all the evidence

showed was that petitioner was exercising rights and privileges guaranteed him by the First and Fourteenth Amendments (R. 7).

At the end of trial (R. 138), petitioner filed a motion for new trial renewing the allegations contained in the previous motions (R. 8-9).

All of petitioner's motions were overruled and petitioner was found guilty as charged (R. 10-11).

Petitioner renewed his federal constitutional claims by assignments of error to the Alabama Court of Appeals (R. 141) which without consideration of his constitutional claims affirmed his conviction (R. 142) *infra*, pp. 1a-5a. The Alabama Supreme Court denied petitioner's timely filed application for writ of certiorari (R. 154) and overruled his application for rehearing (*Id.*) *infra*, pp. 8a-9a.

## Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

### I

**Petitioner's conviction was affirmed on a record containing no evidence of his guilt contrary to the due process clause of the Fourteenth Amendment.**

In affirming petitioner's conviction, the Alabama Court of Appeals did not consider the evidence contradicting the City's version of the circumstances leading to petitioner's arrest but merely upheld the Circuit Court's overruling of petitioner's motion to exclude the evidence, stating that "[w]hen there is sufficient evidence on the part of the prosecution to make out a prima facie case, a motion to

exclude the evidence should be overruled. *Drummond* v. *State*, 37 Ala. App. 308, 67 So. 2d 280" (R. 145).

But fully accepting the City's version of the facts, there is no evidence that petitioner committed a crime. He was charged under the language of the second paragraph of section 1142 for obstructing free passage or for standing or loitering after being reqeusted to move on (R. 2). But neither petitioner nor anyone else was arrested for obstruction of passage along the sidewalk for, as officer Byars testified, everyone obeyed his order to move (R. 37) "except the Defendant Shuttlesworth, who had never moved" (R. 30). Thus, Shuttlesworth's arrest appears to have been made only for failing to move when ordered to do so. But the evidence shows that petitioner did move—he started into the store; in the words of another officer, he "[j]ust walked off with the rest of the crowd" (R. 54). And if, as the City says, petitioner had already been placed under arrest when he began to move, it is clear that the only possible reason for his arrest was that he was the only person who made any statements to the officer while he was allegedly issuing his command to the crowd to move. According to the City's testimony, those statements were "do you mean to tell me we can't stand here in front of this store" (R. 19) and "well, I will go into the store" (19). Even if these peaceful statements (and there is no evidence that petitioner was anything other than peaceful) could be construed as arguing with the policeman, petitioner still did nothing criminal. Cf. *Thompson* v. *Louisville*, 362 U. S. 199, 206; *Wright* v. *Georgia*, 373 U. S. 284, 286.

Petitioner's conduct, which consisted of making statements to a police officer and attempting to go into Newberry's store, is certainly not evidence of standing or loitering after being requested to move or of failing to comply with the lawful order of a policeman. To convict petitioner

on no evidence of substantial elements of the crime with which he was charged is a violation of due process. *Thompson* v. *Louisville, supra; Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Taylor* v. *Louisiana,* 370 U. S. 154; *Fields* v. *City of Fairfield,* 375 U. S. 248 (1963). And if it could somehow be assumed that these acts were criminal, they were not charged. It is equally a violation of due process to convict a man of a crime not charged. *DeJonge* v. *Oregon,* 299 U. S. 353, 362 (1937); *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948); *Shuttlesworth* v. *City of Birmingham,* 376 U. S. 339 (1964).

But the evidence presented on behalf of the defense casts strong doubt on the version of the arrest given by the City. Moreover, none of the contradictory testimony offered by the defense was challenged by the city's attorney on cross-examination (R. 90-91; 100-101; 109; 113; 121-124; 127-128; 36). The only things agreed upon by the respective witnesses for the city and the defense were the time and place of the incident and the fact of petitioner's arrest.

Thus, the number of persons involved was disputed, being estimated by the city's witnesses as 10 to 12 (R. 18, 40, 51, 76), by the defense witnesses as no more than 4 or 5 (R. 84, 86, 90).[1] Also disputed is why the crowd collected, the city's version being that petitioner stopped and congregated with a group of 10 to 12 persons who were "just standing and listening and talking" (R. 18) while the defense testified that no persons or friends met petitioner and his companions at the corner (R. 90) and further that no crowd collected until the police officer entered

[1] In fact, Officer Byars testified that when he first saw petitioner he was in the company of only 4 or 5 other persons and he did not know "where the additional people . . . came from" (R. 40). But his fellow officer, Hallman, testified that there were only 5 or 6 people in the group talking to Byars (R. 62).

the picture (R. 99). Whether the crowd was all Negro (R. 51) or composed of whites and Negroes (R. 99, 106) was also at issue as was the length of time during which the incident occurred, Officer Byars having testified that he stood inside the entrance door to Newberry's watching petitioner and his companions assembled on the corner "for a minute to a minute and a half" (R. 18) and spent another "minute or minute and a half talking to them outside trying to encourage them to move" (R. 34) while petitioner and the other defense witnesses testified that they were accosted by Officer Byars while in motion approaching the corner and did not stop and stand on the corner (R. 91, 110, 116, 131-132) and thus the entire arrest incident took less than a minute (R. 118, 133). Also directly challenged by the defense evidence was the testimony of the primary arresting officer that he spoke to the allegedly assembled crowd three times requesting them to move on (R. 19); the witnesses for the defense testified uniformly that Officer Byars emerged from Newberry's store and placed himself directly in front of petitioner and said to him once only and to no one else "Move on" (R. 94, 104, 106, 110, 115). Whether petitioner was placed under arrest before entering the store was also disputed as Byars testified that Shuttlesworth was arrested before he moved (R. 21) while petitioner (R. 121) and others (R. 97, 109) testified that he was not placed under arrest until he started into the store.

In addition, Byars testified on direct examination that petitioner's group was standing in the western half of the western crosswalk of 2nd Avenue and 19th Street North (R. 18) and that as he was observing them from the inside of Newberry's store "on some occasions people who were walking in an easterly direction on the north side of 2nd Avenue had to go into the street to get around the people who were standing there" (R. 18). But on cross-examina-

tion the defense counsel diagrammed the scene on a blackboard (R. 21) and Officer Byars drew an X to mark the spot where petitioner's group was allegedly congregated (R. 22). He then testified as follows:

> Q. I saw (sic) assuming the defendants were standing where you drew that little mark there, that would have left more than half of this north-south crosswalk free, would it not? A. That is true.
>
> Q. And they didn't block the east-west crosswalk at all did they? A. They did not (R. 22-23).

These discrepancies were glossed over completely by the Alabama Court of Appeals but the record taken as a whole makes it clear that the version of the facts given by the witnesses for the defense is the correct version. In any event, petitioner need not rely on his own evidence, though it demonstrates how specious were the charges against him. Even under the state's version he was guilty of no crime. See pp. 12 to 13, *supra*.

The record moreover supports an inference that the real reason for petitioner's arrest and conviction was his civil rights activities in the City of Birmingham. At the time of his arrest there was a selective buying campaign going on in Birmingham on the part of the Negro community (R. 25, 66, 81, 125, 136). Defense counsel attempted to show that petitioner's arrest was part of a police tactic of harassment in retaliation for his course of civil rights conduct which had resulted in numerous other arrests by the Birmingham Police Department (R. 25, 48, 80, 118, 119). The Circuit Court sustained the City's objections to this line of questioning (R. 119) and the Court of Appeals affirmed (R. 146). However, the only plausible explanation of this conviction on no evidence is that it was part of a campaign of harassment against him for his civil

rights activities (R. 48). This should be considered with petitioner's many arrests by the Birmingham police over a number of years (R. 48)[1] and the number of occasions that these arrests and subsequent convictions have been brought to this court.[2] Only in this context does such a baseless prosecution make sense.

## II

**Petitioner's conviction was secured under ordinances which as applied to his conduct are unconstitutionally vague.**

As demonstrated in I, *supra*, what caused petitioner's arrest on this occasion (aside from his civil rights activities) was that he "talked back" to the officer by asking him (taking the City's evidence as a true version of the events that transpired) "do you mean to tell me that we can't stand here in front of this store" (R. 19) and then attempted to enter Newberry's store when ordered to move

---

[1] 1958: ( 1) Reckless driving; 2) Consipiring to commit a breach of the peace; 3) Inciting a violation of disorderly conduct ordinance)
1960: ( 1) Speeding; 2) Aiding and abetting law violation; 3) Giving false information to officer)
1961: ( 1)Violation of peace bond ordinance; 2) Refusing to obey lawful command of officer and interfering with officer in discharge of duty)
1962: (Loitering after warning and failing to obey officer (this case))
1963: ( 1) Parading without a permit; 2) Parading without a permit)

[2] *Shuttlesworth* v. *City of Birmingham*, cert. den. 368 U. S. 959 (1962) (Conviction for disorderly conduct); *Ex Parte Shuttlesworth*, 369 U. S. 35 (1962) (Application for writ of habeas corpus after affirmance of conviction of disorderly conduct); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963) (Conviction for aiding and abetting violation of trespass ordinance); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964) (Conviction of interfering with officer in discharge of his duty affirmed by Ala. Court of Appeals on basis of City's assault ordinance).

on. But petitioner was charged under two ordinances, one of which makes it a crime to stand or loiter upon a street after being told to move (Section 1142) the other of which makes it a crime not to comply with a lawful order of a police officer (Section 1231).[4]

Petitioner could not know that (1) asking a question and (2) going into the store amounted to standing or loitering after an order to move, the conduct interdicted by Section 1142 or failing to obey the lawful command of an officer, the conduct proscribed by Section 1231. Petitioner, therefore, was not given adequate prior warning by the language of either of these ordinances that his peaceful inquiry or his entering the store was a violation of their terms. Thus his conviction under these ordinances is contrary to prior decisions of this court, *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U. S. 459 (1939); *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Bouie* v. *City of Columbia*, —— U. S. ——, 12 L. Ed. 2d 894 (1964). See also *Thompson* v. *Louisiana*, 362 U. S. 199, 206 citing *Lanzetta, supra.* Indeed, the *Thompson* case contains elements of both the "no evidence" and "lack of fair warning" aspects of procedural due process in that the defendant there made peaceful inquiry of the arresting officer as to what was wrong with his conduct and was charged and convicted under an ordinance that did not apprise him

[4] The validity of such ordinances restricting as they do the right to make peaceful and ordinary use of the public streets is open to question. See *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666 (1950). This is particularly true where the ordinances contain no guides to limit police action which "often reflect(s) affront to the policeman's personal sensibilities rather than vindication of the public interest." American Law Institute, *Model Penal Code, Tentative Draft No.* 13, p. 14. See also Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L. J. 1 (1960).

of the fact that what he was shown to have been doing came within the ambit of its proscription.

With particular regard to Section 1231 of the City Code, its inapplicability to defendant's conduct is demonstrated by the Alabama Court of Appeals' opinion in the companion case of *Phifer* v. *City of Birmingham*, 160 So. 2d 898. In reversing Rev. Phifer's conviction, the Court stated:

> "The charge in the second count of the complaint is for a violation of Section 1231, of the General City Code of Birmingham. This section appears in the chapter regulating vehicular traffic and provides for the enforcement of the orders of the officers of the police department in directing such traffic. There is no suggestion in the evidence that the defendant violated any traffic regulation of the city by his refusal to move away from Shuttlesworth when ordered to do so." 160 So. 2d at 901.

Likewise, there is no evidence that petitioner violated any traffic regulation of the City by making peaceful inquiry of the officer and attempting to enter Newberry's store. Thus, the application of Section 1231 to petitioner's conduct to sustain his conviction requires that that conviction be voided for unconstitutional vagueness. Certiorari should be granted because petitioner was convicted under ordinances which, as shown by the proof, had nothing to do with his conduct which was at all times peaceful and lawful.

## CONCLUSION

This case is another instance of petitioner's unfair treatment by state authority because of his civil rights activities in Birmingham. That he could be arrested, brought to trial and convicted on the basis of what is shown on this record is incredible and denies fundamental precepts of due process required by the Fourteenth Amendment. Such a conviction should not be permitted to stand.

It is therefore, respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
NORMAN AMAKER
10 Columbus Circle
New York, New York 10019

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

*Attorneys for Petitioner*

# APPENDIX

## Opinion of the Alabama Court of Appeals

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1963-64

6 Div. 929

F. L. SHUTTLESWORTH,

—v.—

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

PER CURIAM:

Appellant, Fred L. Shuttlesworth, appeals from a conviction by the Circuit Court of Jefferson County, Alabama, of violating Sections 1142 and 1231 of the General City Code of Birmingham, Alabama. The case was heard by the Circuit Judge sitting without a jury. The first count of the complaint charges the appellant with loitering on a street corner with others so as to obstruct free passage along the sidewalk. The other count charges appellant with failure to obey the lawful command of a police officer.

Section 1142 of the General City Code of Birmingham, Street and Sidewalks to Be Kept Open For Free Passage, reads:

> "Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the city with any animal

or vehicle, or with boxes or barrels, glass, trash, rubbish or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such street or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.

"It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on."

Section 1231 of the General City Code of Birmingham, Obedience to Police, reads as follows:

"It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

The evidence, as introduced by the City, tended to show that the defendant was a member of a crowd of about ten or twelve people standing on the corner of 19th Street and 2nd Avenue, North, in the City of Birmingham, and that this crowd was blocking the sidewalk to such an extent that some of the other pedestrians were forced to walk into the street to get around them. The crowd was accosted by one Officer Byars and asked to clear the sidewalk so as not to obstruct pedestrian traffic. The evidence further showed that the crowd remained and when requested to disperse for the third time by Officer Byars, defendant Shuttlesworth said, "You mean to tell me we can't stand here in front of this store?" at which time Officer Byars informed the defendant that he was under arrest. Officer Byars testified that

at the time of the arrest everyone had moved or was moving away except Shuttlesworth. After being told that he was under arrest, Shuttlesworth moved away saying, "Well I will go into the store." Officer Byars then followed Shuttlesworth into Newberry's Department Store and took him into custody.

The appellant's first two assignments of error addressed to the action of the lower court in overruling appellant's motion to Quash and Demurrers to the complaint were overruled on the authority of *Phifer* v. *City of Birmingham*, 6 Div. 930, Ct. of Appeals Manuscript, which case was combined and tried with this one.

The third assignment of error presented by appellant is that the Court erred in denying and overruling the defendant's motion to exclude the testimony and for judgment. When there is sufficient evidence on the part of the prosecution to make out a prima facie case, a motion to exclude the evidence should be overruled. *Drummond* v. *State*, 37 Ala. App. 308, 67 So. 2d 280.

Appellant's fourth assignment of error was that the court erred in denying and overruling defendant's motion for a new trial. All the grounds set out and argued in appellant's motion for new trial, except ground 11, were grounds of a general nature and were properly overruled as sufficient evidence was introduced for the court to find the defendant guilty under the complaint.

The 11th ground of appellant's motion for a new trial is the same as his fifth assignment of error and reads:

> "The court erred in sustaining the objections by the City of Birmingham as to reasons for the arrest and conviction of the appellant, especially regarding his civil rights activities."

The following objections and rulings of the court thereon are alleged to be error by the appellant:

"Q. There was a trial then pending in the Federal Court, is that correct? A. That's right, my release from jail.

"Q. Release from jail? What were the circumstances of your being in there?

"Mr. Walker: We object, Your Honor. That has no bearing on this case.

"Mr. Hall: If Your Honor, please, we insist it is very pertinent. It goes to our theory the reason for the arrest and the heavy penalty.

"Mr. Walker: Your Honor, this is getting far afield from the charge.

"The Court: Sustain the objection.

"Mr. Hall: We want an exception, Your Honor.

"Q. Was there wide publicity given to this Federal hearing? A. Yes.

"Q. Had it been published in the newspapers? A. It had.

"Q. Was there publicity over the radio and by way of the television?

"Mr. Walker: We object to this.

"The Court: Sustained.

"Mr. Walker: It serves no purpose.

"Mr. Hall: Exception, Your Honor.

"Q. How many times have you been arrested by the police of the City of Birmingham because of your civil rights activities?

"Mr. Walker: We object, your Honor. Immaterial.

"The Court: Sustained.

"Mr. Hall: We except, Your Honor."

• • • • •

"Q. Why was it necessary for you to leave 19th Street and 2nd Avenue and go to 16th Street and 5th Avenue to get a cup of coffee?

"Mr. Walker: We object to that, Your Honor, why.

"Mr. Hall: Mr. Walker brought it out on cross-examination. He made a big show of the distance.

"The Court: Leave it out.

"Mr. Hall: We want an exception, Your Honor."

The sustaining of the objections to the foregoing questions was proper as such questions were irrelevant and immaterial to the issues involved.

The trial court, therefore, did not err by sustaining such objections.

The judgment of the Circuit Court is

Affirmed.

## Order and Judgment of the Alabama Court of Appeals

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1964

6 Div. 929

F. L. SHUTTLESWORTH,

—v.—

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

January 25, 1963

Transcript Filed

April 18, 1963

Come the parties by attorneys, and submit this cause on briefs for decision.

November 19, 1963

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the cost of appeal of this court and of the Circuit Court.

**Order of Alabama Court of Appeals Denying Rehearing**

January 7, 1964

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

## Orders of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

Thursday, February 20, 1964

The Court Met Pursuant to Adjournment

Present: All the Justices

6th Div. 65

Ex Parte: Fred L. Shuttlesworth

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

Come the parties by attorneys and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered and ordered that the Writ be and the same is hereby denied and the petition dismissed at the cost of the petitioner, for which costs let execution issue accordingly.

No Opinion.

Thursday, March 26, 1964

THE SUPREME COURT OF ALABAMA

Thursday, March 26, 1963

The Court Met Pursuant to Adjournment

Present: All the Justices

6th Div. 65

Ex Parte: Fred L. Shuttlesworth

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

IT IS ORDERED that the application for rehearing filed in the above styled cause on March 6, 1964, be and the same is hereby overruled.